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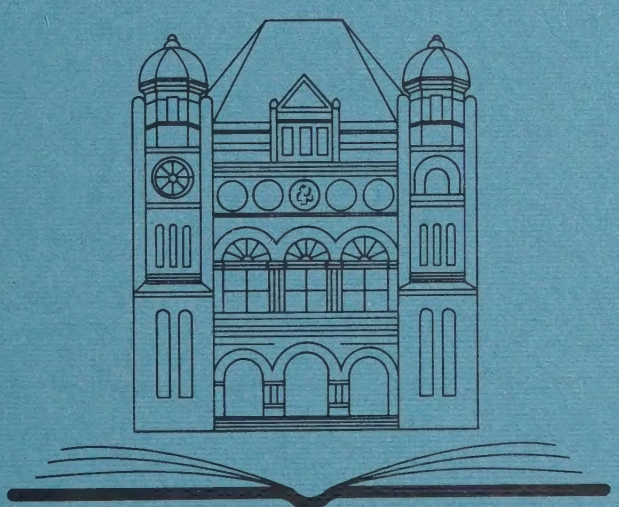

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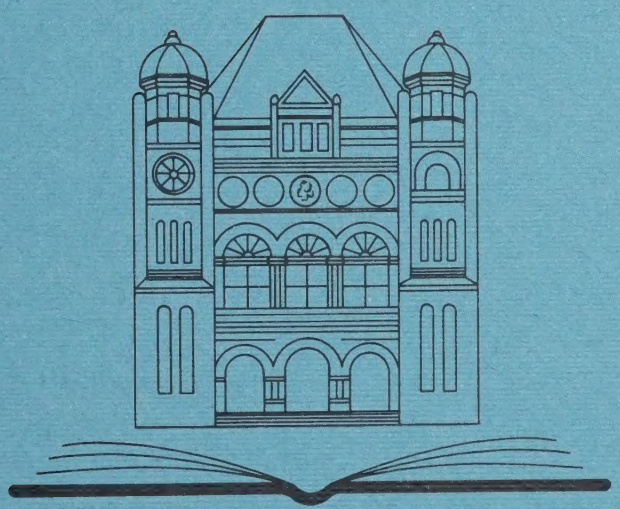

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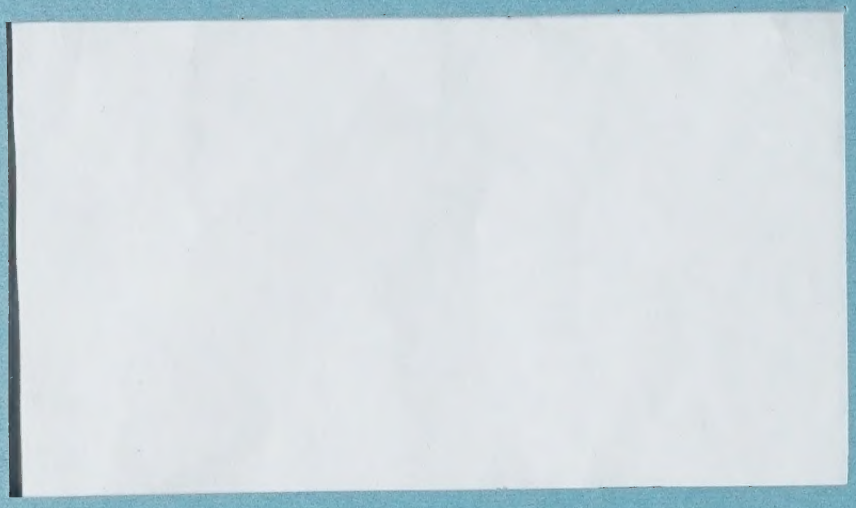

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A PRIMER FOR CURRENT CONSTITUTIONAL DEBATES

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March 1992

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INTRODUCTION

The issues at hand in the current round of constitutional negotiation are crucial to the future shape of the nation. But these issues are also incredibly complex and many people find them difficult to understand, let alone feel sufficiently informed to participate in constitutional debates. One factor that can facilitate understanding and participation is basic background information on the existing constitutional situation, the origins of contemporary areas of dispute, current lines of debate on key issues, and the range of reform proposals being offered by legislative committees, governments and other groups. This Current Issue Paper is designed to provide just such basic information; to serve as a primer for the ongoing constitutional discussions now under way.

The Legislative Research Service prepared background material for the October 1991 "Conference on Ontario in Confederation" sponsored by the Select Committee on Ontario in Confederation. The material was designed to provide sufficient information for delegates who were not constitutional specialists to engage in workshop discussions. These workshops were the core of the Conference; the forum where delegates came together to discuss and debate key constitutional issues and to pass on their opinions and conclusions to the Select Committee.* We think the background notes prepared for the workshops will be of broader interest as a source of basic background information on current constitutional affairs and this material forms the bulk of this paper.** We hope Members will find it helpful in their own deliberations in the coming months; they may also find it useful to pass on to constituents.

The notes developed for the conference referred to various key reports and proposals outstanding at the time, including the Ontario government discussion paper on the idea of a social charter and the September 1991 federal government's *Shaping Canada's Future Together: Proposals*. There have been a number of reports from across the country since then. For this reason, Members wishing detail on specific reports, reform proposals and issues could read this paper in conjunction with CIP # 122, *A*

Comparative Summary of Key Constitutional Documents, Reports and Proposals, which summarizes the recommendations of 21 key constitutional documents and reports, including the existing constitutional framework, for key issue areas. However, there have been two recent reports that will be of particular interest to Ontario legislators and citizens: the report of the Select Committee on Ontario in Confederation and the report of the Special Joint Committee of the Senate and the House of Commons on a Renewed Canada (the Beaudoin-Dobbie committee), around which considerable debate and inter-governmental negotiation is bound to focus in the crucial coming months. A summary of each report's recommendations is included at the end of each section of background material.

* Discussions in these workshops were summarized by LRS staff for the report on the conference to the Select Committee. Interested readers can obtain a copy of the report of the conference proceedings by contacting the Clerk of the Select Committee at 416-325-3525 or by writing the Clerk at Room 3603, Whitney Block, Queen's Park, Toronto, M7A 1A2.

** We relied on the standard constitutional sources and documents in preparing these notes; but we want to particularly acknowledge Peter W. Hogg, *Constitutional Law in Canada*, 2nd ed. (Toronto: Carswell, 1985).

FUNDAMENTAL CHARACTERISTICS AND VALUES OF CANADA

Starting Points

To provide some focus for discussion in the conference workshops, delegates were provided with a series of possible questions, as well as the following background information. The background notes were specifically geared to the discussion questions set out for each session, and the introduction to this and each set of notes below indicates the range of questions that were being addressed. The background material for this workshop was designed to address questions such as the following:

- What are the fundamental characteristics which define Canada and which should direct and inform our governing institutions?
- How should these characteristics and principles be recognized and advanced in the Constitution?

Background

- Some relevant provisions include the preambles to the *Constitution Act, 1867* and the *Charter of Rights and Freedoms*, and ss. 25, 27 and 28 of the *Charter*.
- The *Charter* provides that it is to be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians (s. 27). It also provides that the rights and freedoms referred to in it are guaranteed equally to male and female persons (s. 28), and that the guarantee of those rights is not to be construed so as to abrogate or derogate from any Aboriginal, treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada (s. 25).
- The *Meech Lake Accord* (1987) proposed that the Constitution be amended to provide that the Constitution (which includes the *Charter*) be interpreted in a manner "consistent with:
    - the recognition that the existence of French-speaking Canadians, centred in Quebec but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside Quebec but also present in Quebec, constitutes a fundamental characteristic of Canada; and
    - the recognition that Quebec constitutes within Canada a distinct society."

- However, the *Accord* provided that this amendment was not to affect the provisions of the Constitution concerning multicultural heritage and Aboriginal peoples (including ss. 25 and 27 above). No similar statement was made concerning gender equality rights.

- In the discussions that followed the *Accord*, two criticisms in particular were made concerning the duality/distinct society clause. One was that the clause should be elaborated to include other important fundamental characteristics of Canada. Another criticism, put forward by some women's and other equality-seeking groups, was that the *Accord* jeopardized equality rights.

- In response to these concerns, the Ontario Legislature's Select Committee on Constitutional Reform (1988), appointed to consider the *Meech Lake Accord*, recommended that an amendment to the Constitution to elaborate the concept of "fundamental characteristics" be considered following the ratification of the *Accord*. The Committee proposed that the amendment should include the following:

    - a recognition that Aboriginal peoples constitute a distinctive and fundamental characteristic of Canada;

    - a recognition that our multicultural heritage and Canada's commitment to equal respect for the many origins, creeds and cultures that shape our society constitute a fundamental characteristic of Canada;

    - a recognition that the commitment to the protection and guarantee of the rights and freedoms of all Canadians constitutes a fundamental characteristic of Canada.

- Subsequently, the *1990 Constitutional Agreement*, which would have amended the *Accord* in some respects, was reached. Among other things, this agreement provided that:

    - the *Accord* be amended so that the duality/distinct society clause would not affect s. 28 of the *Charter* (which, as noted earlier, provides that *Charter* rights and freedoms are guaranteed equally to both sexes.); and

    - that an all-party Special Committee of the House of Commons would hold public hearings (which would have commenced in July 1990) and report on the substance and placement of a statement of constitutional recognitions (referred to as a "Canada Clause") to be considered by the First Ministers.

- This agreement was considered by the Ontario Legislature's Select Committee on Constitutional and Intergovernmental Affairs (1990) which affirmed the recommendation of the 1988 Select Committee with respect to the elaboration

of the concept of "fundamental characteristics," and made specific reference to the inclusion of gender equality rights in this regard.

- Certain values and principles have been identified as underlying the *Charter* and as constituting the standard against which a law which infringes a person's rights must be judged to determine whether it is a "reasonable limit" on that right. The Supreme Court of Canada has stated that these principles include:

  - respect for the inherent dignity of the human person;
  - commitment to social justice and equality;
  - accommodation of a wide variety of beliefs;
  - respect for cultural and group identity; and
  - faith in social and political institutions which enhance the participation of individuals and groups in society.

- The September 1991 federal proposals recommend that a "Canada Clause" which acknowledges who we are as a people, and who we aspire to be, be entrenched in the Constitution.

- The federal proposals also recommend that a duality/distinct society clause, with a definition of the concept of distinct society, be included in the *Charter*.

- The Ontario Select Committee recommended a Canada Clause be included in the preamble of the Constitution. It said this clause should express Canada's fundamental values and characteristics, including the special role of Quebec, the significance of the First Nations, and our traditional respect for racial, cultural and linguistic diversity.

- The Federal Special Joint Committee report, released March 1, recommended that Canada's identity and values be expressed in a preamble, for which it provided a possible draft. As well, it recommended a Canada Clause be included in the Constitution, setting out our fundamental values and principles in more detail; such a clause would be interpretative in effect.

(See also background notes for the "Charter of Rights and Freedoms" workshop).

CHARTER OF RIGHTS AND FREEDOMS

Starting Points

These notes were organized around questions such as the following:

- Does the *Charter of Rights and Freedoms* adequately protect the rights and freedoms set out? Should any of the existing provisions be amended and if so how?

- Should social and economic rights - for example, rights pertaining to an adequate standard of living, employment and employment conditions, health, education, and social security - be incorporated in the Constitution? If so, which rights should be included and how should they be enforced?

- Should Parliament and Legislatures have the power to override rights and freedoms guaranteed in the *Charter of Rights and Freedoms*? If so, which rights and freedoms should be capable of being overridden? Should the exercise of the override power be made more difficult?

Background

- The *Charter of Rights and Freedoms* forms Part I of the *Constitution Act, 1982* (ss. 1-34). Other relevant provisions of the *Constitution Act, 1982* include ss. 35(4), 52 and 59.

- The *Charter* was entrenched in the Constitution as part of the repatriation of the Constitution in 1982.

- The *Charter* protects a range of primarily civil and political rights including the fundamental freedoms of conscience and religion, thought, belief, opinion and expression, peaceful assembly and association, democratic (ie. right to vote) and mobility rights, and legal (ie. right to life, liberty and security of the person), equality and language rights.

- The protection of these rights is subject to "reasonable limits." A determination of whether a limit or law is reasonable involves a consideration of the following:

    - the importance of the objective of the law;

    - how carefully designed the measures are to achieve the objective;

    - whether there are other methods of achieving the objective which would infringe the right to a lesser extent; and

- the relative importance of the objective and the infringement of the right in question.

- If a law violates or is inconsistent with the *Charter*, then it is of no force or effect (s. 52(1)). Decisions as to whether a law or action is inconsistent with the *Charter* are made by the courts. As a result, the Supreme Court of Canada ultimately determines whether a law or action violates the *Charter*.

- A person whose *Charter* right has been violated may apply to a competent court to obtain such remedy as the court considers appropriate and just in the circumstances. The remedy could include a dismissal of a criminal charge, a declaration that a law is invalid or an award of damages.

- The rights in the *Charter* vary in terms of who is entitled to benefit from them. Where the right is guaranteed to "everyone," "any person," "any member of the public," or "anyone," the right has generally been interpreted to apply to both individuals and corporations or other similar entities. On the other hand, where the terms "every individual" or "every citizen" are used, the right is not likely to be extended to corporations.

- The *Charter* applies to the actions of Parliament and the government of Canada, and to the actions of the Legislatures and governments of each province, in relation to all matters within their respective authorities. It places restrictions on their powers by preventing the exercise of those powers in a way which would infringe a person's rights under the *Charter*. The *Charter* does not apply so as to restrict the actions of private persons.

- Although the *Charter* places restrictions on the powers of government, it also provides that Parliament or the legislature of a province may enact legislation to operate notwithstanding a provision of the *Charter* (s. 33). To effectively "override" the *Charter* in this way there must be an express declaration in the legislation to this effect. A declaration in this respect will cease to have effect after 5 years, but it may be re-enacted. The power of governments to "override" the *Charter* in this way applies only to ss. 2 and 7-15 of the *Charter*.

- The *Charter* provides that it is to be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians. It also provides that the rights and freedoms referred to in it are guaranteed equally to male and female persons, and that the guarantee of those rights is not to be construed so as to abrogate or derogate from any Aboriginal, treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada.

- The *Constitution Act, 1982* (s. 36) states that Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to promoting equal opportunities for the well-being of Canadians, furthering economic development to reduce disparity in opportunities, and providing essential public services of reasonable quality to all Canadians. Parliament and the government of Canada are also committed to the principle of making equalization payments to assist poorer provinces in providing public services.

- Economic, social and cultural interests such as those pertaining to an adequate standard of living, employment and employment conditions, health, education and social security are not protected by the *Charter*. As a nation, Canada is a party to the *International Covenant on Economic, Social and Cultural Rights* (in force January 1976) in which it agrees that people have certain economic, social and cultural rights and it agrees to "undertake(s) to take steps, . . ., to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." As a party to the Covenant, Canada also undertakes to submit reports "on the measures which they have adopted and the progress made in achieving the observance of the rights" recognized in the Covenant. Canada has submitted a series of reports in such areas as the right to work, the right to an adequate standard of living and the right to education.

- There are no constitutional rights with respect to a clean or healthful environment.

- The Ontario government proposed in September 1991 that the Constitution should include a social charter which would both state the key social values and principles Canadians wish to affirm and guide governments in the realm of social policy. There would need to be institutions (one option could be an expanded role for the Senate) for developing, monitoring and enforcing policies that would put these values and principles into practice. There would also need to be broad public participation at all stages of this process and a recognition that "national sharing" is required for the charter's principles to be realized across the country. (Subsequently, in February 1992, Premier Bob Rae released a detailed proposal for a social charter, based on a revised s. 36 of the *Constitution Act, 1982*.)

- The September 1991 federal proposals recommend that:

    - the *Charter* be amended to guarantee property rights;

    - the votes necessary for Parliament or a provincial legislature to invoke the override (section 33) be changed from a simple majority to 60% of the members of Parliament or the provincial legislature; and

- the *Charter* be amended to provide that it is to be interpreted in a manner consistent with the recognition of Quebec as a distinct society within Canada.

- The Ontario Select Committee's final report did not make precise recommendations for change to the *Charter*, indicating instead several issues that should be part of a general review of the *Charter*. It did, however, recommend the five-year period set out in the "notwithstanding clause," after which a declaration invoking it must be renewed, be reduced to three years. (The report's discussion of social and economic rights are dealt with in the Division of Powers section.)

- The federal Beaudoin-Dobbie committee urged that consideration of the proposed restrictions on use of the notwithstanding clause be postponed.

(See also background notes above for the "Fundamental Characteristics and Values of Canada" workshop).

ABORIGINAL ISSUES

Starting Points

These notes began from a number of detailed questions, including:

- Should the inherent right to Aboriginal self-government be entrenched in the Constitution? If so, how should it be done?

- Should there be a third, Aboriginal, order of government recognized in the Constitution? If so, what should this look like?

- Should the "three founding nations" (Aboriginal, French and English, in order of arrival) be recognized in the Constitution? Should this recognition be in a Canada Clause?

- Should Aboriginal people have a guaranteed number of seats in the House of Commons, the Senate, and/or the provincial legislatures?

- Where does the settlement of land claims fit in with constitutional negotiations?

- How should other pressing social and economic issues facing Aboriginal communities be addressed? How would shared-cost programs with provincial and federal levels of government be dealt with?

General

- In 1763, George III issued a Royal Proclamation in which he recognized the title of Indians in the area west of existing European settlement, and said that only the Crown could negotiate with them to buy their lands. These negotiations resulted in treaties between the Crown and particular groups of Aboriginal peoples.

- There are a number of provisions of Canada's Constitution which are particularly relevant to Aboriginal people: including s. 91(24) of the *Constitution Act, 1867*, and ss. 25, 35 and 35.1 of the *Constitution Act, 1982*.

- Responsibility for "Indians, and Lands reserved for the Indians" lies with the federal government under s. 91(24) of the *Constitution Act, 1867*. However, subject to certain exceptions, provincial laws apply to Indians and lands reserved for the Indians.

- Nothing in the *Charter* shall detract from "Aboriginal, treaty or other rights and freedoms" of the Aboriginal people of Canada, including the Royal Proclamation of 1763 (which was the first acknowledgment by the British Crown of Aboriginal title to land) and present or future land claim agreements (s. 25).

- Section 35(1) of the *Constitution Act, 1982* says that "The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed." That statement is clarified: the term "Aboriginal peoples" includes "the Indian, Inuit and Metis people" (s. 35(2)); and "treaty rights" include rights that exist by way of present or future land claims agreements(s. 35(3)). S. 35(4) says that Aboriginal and treaty rights are "guaranteed equally to male and female persons," notwithstanding anything else in the Act.

- The government is committed by s. 35.1 to inviting representatives of the Aboriginal people of Canada to participate in discussions at a constitutional conference if any changes are made to any of the above sections of the Constitution.

- A series of four constitutional conferences were held between 1983 and 1987 in an effort to entrench the right to Aboriginal self-government in the Constitution. Representatives of the provinces and Aboriginal people failed to come to an agreement on the issue; four provinces would not agree to endorse the concept itself.

- Last summer, the Rt. Hon. Joe Clark established a "parallel process" of negotiations with the four national Aboriginal groups. Under this process, four Constituent Assemblies (of Aboriginal youth, women, urban citizens and elders) were held by the Assembly of First Nations, and all four national

groups representing Aboriginal people have held formal consultations with their constituencies.

- Although Metis people are treated as Aboriginal people in the *Charter*, the federal government has not acknowledged other responsibility for them. The federal government's relationship with "Indians" is governed by the *Indian Act*. This law defines who is an Indian for the purposes of the federal government, the nature of Indian reserves, the form of government on those reserves, and economic questions such as revenue from resources, and income tax of Indians on reserves. The federal government also has responsibility for the Inuit, but this relationship is not governed by the *Indian Act*. In the September 1991 federal proposals, the government makes a "commitment" to address its role vis-a-vis the Metis.

- In the same document, the federal government proposes that a process to deal with outstanding Aboriginal matters be entrenched in the Constitution. It also proposes recognition in the "Canada Clause" of Aboriginal rights and that Aboriginal peoples were historically self-governing.

- The Ontario Select Committee recommended recognition of the Aboriginal people in the Canada Clause, and their full participation in constitutional discussions.

- The Beaudoin-Dobbie committee recommended references to the role, rights and unique contributions of Aboriginal peoples be included in a preamble and Canada Clause. It also set out how Aboriginal peoples should be included in constitutional discussions.

Self-Government

- Since the failure of the conferences mentioned above, the federal government has pursued a policy of negotiating self-government agreements on a community-by-community basis. Only one community, the Sechelt Band in B.C., has gone fully along this route, gaining a municipal-type government by the passage of federal and provincial laws to that effect.

- The recent federal paper proposes that the starting point for negotiations be constitutional recognition of the right to Aboriginal self-government. This statement would not be enforceable for up to ten years from adoption of the amendment. During this time, conferences would be held regularly, details negotiated and agreements entrenched. If no agreement is reached in ten years, the general right could be defined by the courts.

- The Ontario government has also pursued self-government negotiations with the federal government and First Nations. This was officially announced in a "Declaration of Political Intent" in December 1985. A "Statement of Political Relationship," recognizing "the inherent right to self-government of the First

Nations" was signed by the Ontario government and the Chiefs of Ontario in August 1991.

- The Ontario Select Committee recommended the *inherent* right of Aboriginal people to self-government be affirmed in the Constitution, as well as the fiduciary responsibility of the federal government towards Aboriginal people. Otherwise, it indicated its strong support for the Aboriginal agenda and its desire to leave flexibility to Aboriginal people as to how their goals should be achieved.

- The federal Special Joint Committee also recommended the inherent right of Aboriginal peoples to self-government be entrenched in the Constitution, as well as a transition process through which the precise definition of the concept would be negotiated. In addition, the committee said a small agency, jointly managed by Ottawa and the Aboriginal people, should be set up to administer federal treaty obligations and fiduciary responsibilities to Aboriginal peoples.

National Institutions

- A committee of present and former Aboriginal legislators has recommended to the Royal Commission on Electoral Reform and Party Financing that there be reserved seats in Parliament for Aboriginal people, on the New Zealand model. The Royal Commission subsequently endorsed this proposal in its 1992 report.

- The September federal constitutional proposals include a provision for guaranteed Aboriginal representation in a reformed Senate.

- The Beaudoin-Dobbie committee recommended guaranteed representation in a reformed Senate for Aboriginal peoples, if they wish it.

CONSTITUTIONAL CHANGE AND THE ECONOMY

Starting Points

These background notes addressed:

- To what extent should the existing economic union of Canada be better addressed or strengthened in the Constitution?

- How should the differing priorities of local economies be accommodated in developing national economic policy? Should the provinces or regions have a role in negotiating international trade agreements? Should the provinces have

a greater say in national economic institutions - for example, the Bank of Canada?

- Are there too many restrictions on the mobility of capital, goods, labour and services between the provinces? How should this problem be addressed?

Background

Some sections of the Constitution relating to regulation of the economy and integration of the economic union are *Constitution Act, 1867*, ss. 91, 92, 92A, 121 and *Constitution Act, 1982*, ss. 6, 36.

- The Constitution
  - sets out the exclusive powers of Parliament, including the power to regulate trade and commerce. As well, most powers relating to taxation and regulation of banking, public debt and currency reside exclusively with Parliament.
  - sets out the exclusive powers of provincial legislatures, including property and civil rights, direct taxation for provincial purposes, granting of retail and liquor licences, local works, natural resources and electrical power.
  - provides that all Canadian citizens and permanent residents can live and work in any province, subject to provincial laws and practices that do not discriminate against people from other provinces (excluding reasonable residency requirements for the receipt of publicly provided social services). This does not limit government's right to implement any law, program or activity aiming to improve conditions of the disadvantaged in a province where the rate of employment is lower than the national employment rate. For example, a law which required preference in employment in a particular industry to be given to residents of a particular province might be permitted even though it discriminates against people from other provinces.
  - states that all produce and manufactured goods can pass freely from one province to any other. This is commonly interpreted to refer only to interprovincial tariff barriers.
- There are currently more than 300 barriers to interprovincial trade instituted by the federal and provincial governments. They include discriminatory government procurement practices and policies, marketing boards, subsidies, technical standards relating to health and safety, and professional standards.

Industries especially affected by such barriers include breweries, agriculture and food, trucking and telecommunications.

- The impact of such trade barriers has been discussed at least since the federal Rowell-Sirois commission report of 1940. In this ongoing debate, the argument that barriers lead to uneconomic industries and distortions in the national economy is countered by the contention that provinces must be able to bolster their local economies and regulate key industries for the benefit of their citizens.

- In 1985, the Royal Commission on the Economic Union and Development Prospects for Canada (Macdonald Commission) proposed establishing a national Code of Economic Conduct to spell out policies that would strengthen the economic union, and a federal-provincial Council of Ministers for Economic Development to implement it. As part of this project, provincial governments would be asked to justify existing barriers, and then each barrier would be considered in this context. The Commission did not see major reform to the Constitution or national institutions as the way to achieve such change. Since then, several academics and business groups have called for the reduction or elimination of interprovincial barriers as a means to making Canadian industry more efficient and globally competitive.

- International trade agreements, such as the General Agreement on Tariffs and Trade (GATT) and the Canada-U.S. Free Trade Agreement, have already obliged the federal government to change discriminatory practices in its jurisdiction; for example, to comply with both GATT and the FTA, it must allow non-Canadian suppliers to bid on most federal government contracts above a certain value.

- The *Constitution Act, 1982* commits Parliament and provincial legislatures, and their respective governments, to promote equal opportunities for the well-being of Canadians, further economic development to reduce disparities in opportunities, and provide essential public services of reasonable quality to all Canadians.

- The act also commits Parliament and the federal government to the principle of making equalization payments to ensure provinces have sufficient revenue to provide reasonably comparable levels of services at reasonably comparable levels of taxation.

- The September 1991 federal proposals include measures to strengthen the economic union:

    - entrenching in the Constitution the four so-called economic freedoms (free flow of persons, goods, services and capital), effective July 1, 1995;

- providing Parliament with the constitutional authority to make laws affecting the efficient functioning of the economic union, subject to a specified degree of provincial approval and with provisions for opting out by dissenting provinces; and

- the federal government, with provincial consultation, will develop guidelines to improve coordination of fiscal policies and their harmonization with Canada's monetary policy, with the same approval and opting-out provisions as above.

- The federal government proposes to clearly define the Bank of Canada's mandate and to consult provincial and territorial governments on appointments to the Board and regional panels.

- The proposals also include the entrenchment of a Council of the Federation, composed of federal, provincial and territorial representatives, to decide on issues relating to intergovernmental coordination and harmonization of fiscal policy, and use of the federal spending power.

- The Ontario Select Committee acknowledged the importance of addressing internal trade barriers, but recommended that specific measures to strengthen the economic union be removed from the constitutional agenda and dealt with through other intergovernmental discussions. (Its recommendations regarding revision of s. 36 are summarized in the Division of Powers Section.)

- The Beaudoin-Dobbie committee recommended that s. 121 of the *Constitution Act, 1867* be replaced with a new section that would prohibit government restrictions on the free movement of goods, services, persons and capital, within certain parameters and exceptions. It also urged a three-stage dispute-solving mechanism be established, and that s. 36 of the *Constitution Act, 1982* be revised to commit governments to strengthening the economic union.

- As well, the federal committee said the mandate of the Bank of Canada should not be part of constitutional discussions, and recommended a First Ministers' conference be held annually on economic and social matters.

QUEBEC'S FUTURE IN CANADA

Starting Points

The questions designed for this workshop included the following:

- In what ways is Quebec a distinct society?

- Should Quebec's distinctness be recognized in the Constitution? If so, how? In particular, should this distinctness be recognized as a fundamental characteristic of Canada in a "Canada Clause" in the Constitution?

- How should the rights of linguistic minorities in Quebec and across the country be protected? Are the existing constitutional guarantees adequate?

- What additional powers would it be appropriate for Quebec to exercise?

- Should other provinces also be able to exercise some or all of these powers? If all provinces are able to exercise all additional powers allocated to Quebec, should provinces be able to "delegate back" certain powers and responsibilities to the federal government?

- Should provinces have the right to secede from Canada?

General

When Canada's Constitution was repatriated in 1982 Quebec stood alone in opposition. Premier Réné Lévesque had refused in November 1981 to join the nine other premiers and the Prime Minister in agreeing on a package of amendments that eventually became the *Constitution Act, 1982*. After the document became law, Quebec sought to challenge it in court, arguing it had a traditional veto over constitutional amendments. The Supreme Court of Canada ultimately denied Quebec had any veto in law. Later, the Quebec government used the new "notwithstanding clause" to declare all existing and new provincial statutes beyond the purview of the *Charter of Rights*, ss. 2 and 7-15.

In 1986, with new governments in both Quebec City and Ottawa, Premier Robert Bourassa announced Quebec would accept the *Constitution Act, 1982* if five conditions were met. These were: (1) Quebec be recognized as a distinct society; (2) the provinces be given a larger role in immigration; (3) a provincial role be established in appointments to the Supreme Court of Canada; (4) limitations be placed on federal spending powers; and (5) Quebec be given a veto on future constitutional amendments.

The Meech Lake Constitutional Accord, concluded in June 1987, addressed all five points. However, one point -- declaring Quebec a distinct society and affirming the role of its government in preserving and promoting its distinct character -- emerged as a major hurdle when the premiers sought to ratify the agreement in the following three years. Although the distinct society clause did not, arguably, involve any distribution of powers, it did suggest to some Canadians that Quebec was to be treated differently and therefore unequally. When the Quebec National Assembly again used the notwithstanding clause to enact its controversial sign law, Bill 178, after the Supreme Court of Canada had ruled certain sections of its predecessor unconstitutional in December 1988, this interpretation became more widespread in the rest of Canada.

On June 23, 1990, the Meech Lake Accord expired after it failed to receive ratification by all provinces. Among the key factors contributing to its demise were the distinct society clause and discontent about perceived special treatment for Quebec, the apparent hurried and closed-door negotiation process, and concern that Aboriginal rights had not been addressed in the agreement.

Immediately afterwards, Quebec Premier Bourassa announced his province would boycott all future constitutional talks, and negotiate only on a bilateral basis with the federal government. In the meantime, Quebec would reconsider its constitutional future. Nine months later, in March 1991, a commission of the National Assembly submitted a report calling for Quebec to hold a referendum on full sovereignty by late October 1992. The National Assembly passed an Act to this effect later in the spring.

Distinct Society

- The *Quebec Act* of 1774 permitted Quebec to retain the Roman Catholic religion and French civil code, thus beginning its history of distinct treatment within British North America.

- Some sections of the Constitution that provide for or permit some degree of distinctness for Quebec are: *Constitution Act, 1867*, ss. 23(6), 93(2), 94 and 129, 133 and *Constitution Act, 1982*, ss. 23 and 59(2). Some of the ways in which the Constitution treats Quebec in a unique way are:

- the property or residency qualifications to be a Senator;

- the protection of the educational rights of denominational minorities has particular, but not exclusive, application in Quebec;

- the right of Quebec to retain its civil code;

- the provision that either English or French may be used in the federal Parliament, the Quebec legislature, and in any federal or Quebec court. Official records in Parliament and the Quebec legislature, and legislation from either level of government must be in both languages.

- the *Constitution Act, 1982* provides for special application in Quebec of some aspects of minority language education rights. Specifically, the Act guarantees to parents whose first language (learned and understood) is that of the English or French linguistic minority of the province they reside in the right to have their children receive their primary and secondary education in that language. This guarantee applies in the rest of Canada but will only apply in Quebec once its application is authorized by either the legislature or government of Quebec. Neither the Quebec National Assembly nor the Quebec government has yet done so.

- There are a number of non-constitutional ways in which Quebec is treated or acts differently than other provinces:

  - by federal statute Quebec is guaranteed three members of the Supreme Court of Canada;

  - Quebec is the only province which controls its own contributory retirement pension plan (all other citizens are covered by the Canada Pension Plan, although any province could adopt a plan similar to Quebec's);

  - Quebec is the only province which collects its own individual income tax.

- The Meech Lake Accord (1987) proposed that the Constitution be amended to provide that it be interpreted in a manner consistent with the duality of French and English as a fundamental characteristic of Canada and the recognition that Quebec constitutes a distinct society within Canada. (For a more detailed statement of this aspect of the Accord see the Background Theme Paper for the "Fundamental Characteristics and Values of Canada" workshop).

- However, the Accord provided that this amendment was not to affect ss. 25 or 27 of the *Charter*. These sections provide that the *Charter* is not to infringe on any Aboriginal, treaty or other rights or freedoms enjoyed by Aboriginal peoples, and that the *Charter* shall be interpreted in a manner consistent with the preservation and enhancement of Canada's multicultural heritage.

- Federal institutions such as Parliament and the courts have been officially bilingual since 1867. In the 1960s and '70s, the federal government initiated a program to encourage bilingualism throughout the federal public service, with a view to provide service to the public in both French and English. This program, which included government-sponsored training programs and incentive bonuses, has affected hiring and promotion criteria across federal ministries. It has drawn both praise and criticism from the public. However, bilingualism seems to be more of an issue outside Quebec than within the province; the program does not appear to have lessened the province's continued determination to be recognized as a distinct society.

- The Government of Canada has proposed restricting the use of the notwithstanding clause in the *Charter* (section 33) by requiring a vote of 60% of the members of Parliament or the provincial legislature involved.

- It has also proposed that the *Charter* be interpreted in a manner consistent with the preservation and promotion of Quebec as a distinct society, and with the preservation of Canada's linguistic duality. An amendment to this effect would also define "distinct society" as including a French-speaking majority, a unique culture and a civil law tradition.

- The federal proposals include a "Canada Clause" acknowledging the fundamental values and characteristics of Canada: its list of fourteen values and characteristics includes the responsibility of governments to preserve Canada's two linguistic communities, and the special responsibility of Quebec in relation to its distinct society.

- The Ontario Select Committee recommended Quebec be recognized as a distinct society in the Constitution. It said the federal proposal in this area was a good starting point for further discussion.

- The Beaudoin-Dobbie committee accepted the distinct society clause proposed by the federal government, with some changes to the subsection referring to linguistic minorities.

Division of Powers

(For a fuller discussion of this issue, see background notes for the "Division of Powers" workshop).

- Legislative power is divided between Parliament and the provincial legislatures. The division of legislative power is set out in Part VI of the *Constitution Act, 1867* (ss. 91-95). At present all governmental powers are divided between the federal and provincial levels of government. The Act also allows for overlapping powers, where there is no clear conflict between them; if a conflict exists, federal authority is paramount.

- If a matter does not fall within one of the Classes of Subject set out in ss. 91-95, then it comes within the federal power to make laws for the peace, order, and good government of Canada. This "residuary power" ensures that the distribution of power is exhaustive.

- Areas of authority cannot be directly transferred between the federal and provincial governments.

- Federal-provincial agreements enable governments to coordinate programs which involve areas within the authority of both levels of government, such as shared-cost programs and immigration.

- Shared-cost programs operate on the basis that the federal government decides on the program and then proposes it to the provinces as a joint venture in which the cost of the program is split. Funds are transferred to the provinces to be used for this purpose. A province can "opt out" of the program but will not receive the federal funds targeted for the program unless it agrees to continue an existing program or establish a comparable new one. A decision not to participate at all therefore denies provinces federal tax dollars.

- The federal government makes "equalization payments" to the poorer provinces (Newfoundland, Prince Edward Island, Nova Scotia, New Brunswick, Quebec, Manitoba and Saskatchewan) to "ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation." The federal government's commitment to this principle is now stated in s. 36 of the *Constitution Act, 1982*.

- The federal proposals address other issues raised by Quebec prior to the signing of the Meech Lake Accord by

    - proposing an amendment regarding the role of provinces and territories in Supreme Court appointments;

    - agreeing to proceed with the constitutional amending formula specified in Meech Lake subject to certain conditions and qualifications (see Background Theme Paper for the "Process of Constitutional Reform" workshop);

    - committing to negotiate immigration agreements with any province, and to constitutionalize existing and new agreements; and

- proposing to restrict federal spending powers through an entrenched commitment not to introduce new national shared-cost programs or conditional transfers in areas of exclusive provincial jurisdiction without a specified degree of provincial approval. Provinces which choose not to participate would receive reasonable compensation if they establish programs which meet the objectives of the new Canada-wide program.

- The federal proposals also include a commitment to negotiate agreements on the role of each level of government with respect to culture, and, where appropriate, to constitutionalize such agreements.

- The Ontario Select Committee recommended a review of the division of powers to address the equitable treatment of all provinces, including meeting Quebec's needs; the need for strong central government; and a concern about overlap and inefficiency in government. It also acknowledged that recognizing Quebec as a distinct society would probably imply granting some special powers to meet the province's unique needs, and proposed several legal mechanisms to reassign powers to Quebec without upsetting the principle of provincial equality under the Constitution.

- Regarding Quebec's other concerns, the Ontario committee recommended that the federal spending power be subject to restrictions; supported the federal proposal to entrench the composition of the Supreme Court (including the statutory requirement that three judges come from Quebec); and called for a regional approach to the amending formula, whereby Quebec would have a veto.

- The Beaudoin-Dobbie committee urged Ottawa to negotiate an agreement on culture with Quebec, after offering to affirm the province's legislative jurisdiction over culture; and recommended provinces be able to opt out with reasonable compensation from shared-cost programs involving use of the federal spending power in areas of exclusive provincial jurisdiction. It also urged that bilateral agreements on immigration between Ottawa and the provinces be constitutionally protected.

- On Quebec's other concerns, the joint committee supported the federal proposal to entrench the current composition of the Supreme Court (including three judges from Quebec). On the issue of Quebec's veto over constitutional change, the federal committee said the matter should be dealt with as a priority and offered several options to meet Quebec's demand.

Quebec Sovereignty

- In the Constitution, there is no provision for one province to withdraw from Confederation. Some legal experts say such a provision could be added

through amendment. It has been argued that the participation of the Prime Minister and other national party leaders in the 1980 Quebec referendum campaign implied recognition of that province's right to secede.

DIVISION OF POWERS

Starting Points

The notes for this session began from questions such as the following:

- Do you favour a strong central government or a more decentralized Canada?
- What are the areas in which the federal government should play a leading role? The provinces?
- Should other levels of government - for example, the territories and municipalities - have the powers they exercise constitutionally entrenched? Should the territories and municipalities have additional powers? Should the territories have provincial status?
- Is it important that all provinces exercise the same powers?
- Should the division of powers be made more flexible, possibly by permitting the federal government and provincial governments to delegate powers to each other?
- Is it important that national standards in certain areas -for example, health, education and welfare - be maintained? How should this be ensured?

Background

- Legislative power is divided between Parliament and the Provincial Legislatures.
- The distribution of legislative power is set out in Part VI of the *Constitution Act, 1867* (ss. 91-95). Parliament has the power to make laws in relation to all matters coming within the Classes of Subject set out in ss. 91, 93(4) and 94, and the Provincial Legislatures those matters set out in ss. 92, 92A(1) and 93(1)-(3). Both levels of government have the power to make laws in relation to those matters set out in ss. 92A(2)(4), 94A and 95 ("concurrent" powers).
- If a matter does not fall within one of the Classes of Subject set out in ss. 91-95, then it comes within the federal power to make laws for the peace, order, and good government of Canada. This "residuary power" ensures that the distribution of power is exhaustive.

- Parliament has the power to assume jurisdiction over a local work (ie. a railway, bridge, oil refinery, etc., within a province) by declaring the work to be for the general advantage of Canada. This power, generally referred to as the "federal declaratory power," has not been exercised in the past thirty years.

- The Classes of Subject are phrased in very general terms, with the result that categories can appear to overlap. For example, the federal "trade and commerce" power (s. 91(2)) would appear to include international, interprovincial, and local trade and commerce. However, the provincial power to regulate "property and civil rights" (s. 92(13)) would also appear to include local trade and commerce. To preserve the exclusivity of the respective levels of government in instances of such potential overlap, the courts have interpreted the Classes of Subject involved narrowly, so that in this example the courts have decided that international and interprovincial trade and commerce are within the federal power, and local trade and commerce within the provincial power.

- The allocation of subject matter exclusively to one level of government does not, however, prevent the existence of overlapping (and valid) federal and provincial laws. In particular, overlapping laws can arise and are permissible in the following circumstances:

    - where the federal and provincial governments have a concurrent power to make laws;

    - where legislation relates to two different matters, one falling within the provincial sphere and the other the federal. For example, highway traffic offenses could be seen to relate to conduct on the roads, a matter relating to the provincial power to regulate property and civil rights (s. 92(13)). However, they could also be characterized as being a matter within the federal power to regulate criminal law (s. 91(27)). In these cases the legislation is said to have a "double aspect" in which case both levels of government have authority to pass the legislation;

    - where legislation which is primarily viewed as relating to a matter within the authority of one level of government incidentally regulates a matter within the authority of the other level of government. For instance, the issue of child custody may be regulated incidentally under the federal divorce power (s. 91(26)), although custody is otherwise a matter coming within property and civil rights in a province (s. 92(13)).

- As indicated, overlapping laws are permitted. However, in the event of a clear conflict between them, the federal law is paramount. This means that the provincial law will be rendered inoperative to the extent of the conflict. This is known as the doctrine of "federal paramountcy."

- Areas of authority cannot be directly transferred between the federal and provincial governments.

- Provincial governments have the power to regulate municipalities and the federal government has the power to regulate the two territories.

- Federal-provincial agreements enable governments to coordinate programs which involve areas within the authority of both levels of government, such as shared-cost programs and immigration.

- Shared-cost programs operate on the basis that the federal government decides on the program then proposes it to the provinces as a joint venture in which the cost of the program is split. Funds are transferred to the provinces to be used for this purpose. A province can opt-out but will not receive the federal funds targeted for the program unless it agrees to continue an existing program or establish a comparable new one. A decision not to participate at all therefore denies provinces federal tax dollars.

- There are a variety of shared-cost programs. Four of the most important are: the post-secondary education program; the Canada Assistance Plan, which provides income security; the hospital insurance program; and the medical care program. Each of these relates to an area of provincial power - education, welfare and health. The power of the federal government to enter these agreements arises from its power to spend the money raised through its taxes, referred to as the "spending power," a power which although not expressed in the Constitution is said to be implicit.

- The federal government makes "equalization payments" to the poorer provinces (Newfoundland, Prince Edward Island, Nova Scotia, New Brunswick, Quebec, Manitoba and Saskatchewan) to "ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation." The federal government's commitment to this principle is now stated in s. 36 of the *Constitution Act, 1982*.

- The September 1991 federal proposals make recommendations which would affect the division or exercise of powers in the following areas: labour market training, immigration, culture, broadcasting, residual or unassigned matters, and the federal declaratory power. In addition, the Government of Canada is prepared to recognize the exclusive jurisdiction of the provinces, and to discuss how best to exercise its own responsibilities, in the following areas: tourism, forestry, mining, recreation, housing and municipal/urban affairs.

- The federal proposals also recommend that:

    - the Parliament of Canada be given the power to make laws in relation to the efficient functioning of the economic union, including the

development of guidelines to improve the coordination of fiscal policies and their harmonization with Canada's monetary policy;

- the Constitution be amended to provide for the delegation of legislative powers between Parliament and one or more of the provincial legislatures;

- there be a review of government programs and services to determine which level of government can best deliver them (a number of areas for initial consideration are specified); and

- a specified degree of provincial approval be required for the creation of new Canada-wide shared-cost programs and conditional transfers in areas of exclusive provincial jurisdiction (this requirement would be entrenched in the Constitution). Provinces which choose not to participate would receive reasonable compensation if they establish programs which meet the objectives of the new Canada-wide program.

- The Ontario Select Committee recommended a review of the division of powers to address the equitable treatment of all provinces, including meeting Quebec's needs; the need for strong central government; and a concern about overlap and inefficiency in government. It also proposed several flexible legal mechanisms to reassign powers to Quebec without upsetting the principle of provincial equality under the Constitution.

- The Ontario committee proposed restrictions on the use of the federal spending power for new Canada-wide shared-cost programs. As well, it proposed a social charter concept, embodied in a revised s. 36, as a way to guard against threats to national standards in social programs.

- The Beaudoin-Dobbie committee generally clarified and added precision to the federal proposals. It more explicitly addressed Quebec's expressed needs regarding culture, and set out several legal mechanisms by which powers could be transferred to all provinces, should they want to assume them. These devices included legislative delegation, bilateral agreements between Ottawa and provinces that could be entrenched in the Constitution, and administrative arrangements. It also recommended provinces be able to opt out of national shared-cost programs with reasonable compensation where the programs involved use of the federal spending power in areas of exclusive provincial jurisdiction.

- The federal committee also recommended s. 36 of the *Constitution Act, 1982* be revised. First, it called for a new s. 36.1 to embrace the concept of a Social Covenant to commit governments to certain social objectives. It also

said a new s. 36.2 should commit governments to strengthening the economic union.

(See also background notes for the "Quebec's Future in Canada" workshop).

NATIONAL INSTITUTIONS AND THE POLITICAL SYSTEM

Starting Points

These notes were designed to address a range of complex questions:

- Should the Senate be reformed or abolished? If reformed, what purposes should the Senate serve?
- How should Senators be selected?
- How should the provinces and territories be represented in the Senate?
- What powers should the Senate exercise?
- Is the present representation of the regions on the Supreme Court adequate? Are there other ways in which the Court should be made more representative, such as the provinces having some control over the appointment of judges?
- Should the electoral system for the House of Commons and the provincial Legislatures be reformed? For example, should there be some type of proportional representation?
- Should the public have greater access to participation in the political process on an ongoing basis?

The Senate

- Some of the provisions of the *Constitution Act, 1867* which concern the Senate are ss. 17, 21-24, and 26-36.
- The original purposes of the Senate included the protection and representation of regional interests in national decision-making and to serve as a counterweight to the popularly-elected House of Commons - the "sober second thought" role.
- Appointments to the Senate are made by the Governor General, who in practice acts solely on the advice of the federal Cabinet. The Senate has a normal membership of 104 Senators. For the purposes of representation in the

Senate, Canada is deemed to consist of "Four Divisions," each with equal representation. The "Four Divisions" and the allocation of Senators to each are:

- Ontario - 24;
- Quebec - 24;
- the Maritime Provinces (Nova Scotia and New Brunswick) and Prince Edward Island - 24 (ten each for Nova Scotia and New Brunswick, and four for Prince Edward Island); and
- the Western Provinces (Manitoba, British Columbia, Saskatchewan, and Alberta) -24 (six each).

Newfoundland, which is not part of a "Division," has six Senators, and the territories have one each. There is provision in the Constitution for the addition of four or eight Senators to be drawn equally from the four "Divisions." This power was exercised for the first time in September 1990.

- The powers of the Senate are the same as the House of Commons, except that money bills must be introduced in the House of Commons (*Constitution Act, 1867*, s. 53) and while any constitutional amendment must be authorized by the House of Commons, the Senate has only a suspensive veto with regards to most constitutional amendments (for at most 180 days) (*Constitution Act, 1982*, ss. 38, 41-44, 46-47).

- Although no bill can become law without the approval of both Houses, because the members of the Senate are appointed, they in fact rarely reject government bills.

- Under the September 1991 federal proposals, there would be an elected Senate with much more equitable provincial and territorial representation than at present. In addition, Aboriginal peoples would be guaranteed representation. The House of Commons, however, would remain the primary legislative body; thus, as is currently the case, the Senate would not be a confidence chamber in which legislative defeat would lead to the resignation of the government. The approval of both the Senate and the House of Commons would still be required for measures to become law, but subject to two exceptions: (1) on matters of national importance, such as national defence and international issues, the Senate would have a six-month suspensive veto only; and (2) the Senate would have no legislative role in relation to appropriation bills and measures to raise funds. The proposals would also give the Senate the power to ratify appointments to certain national institutions, regulatory boards and agencies. A further reform would see the application of special voting rules for matters of language and culture.

- The Ontario Select Committee recommended the Senate be reformed to create a new second chamber that is elected, represents the provinces and territories more equitably, and has new carefully defined powers. In terms of powers, the reformed second chamber would have an absolute veto over bills involving new shared-cost programs in areas of exclusive provincial jurisdiction, and a suspensive veto on other bills.

- The Beaudoin-Dobbie committee put forward a detailed model for a reformed Senate. It called for a Senate elected by proportional representation in multi-member constituencies, and "more equitable" distribution of seats among the provinces and territories; it provided two alternatives for seat distribution.

- In terms of powers, the federal committee said the Senate should have the same authority as the House of Commons, but the Commons could override Senate decisions. The Senate could also ratify such appointments as the Governor of the Bank of Canada and nominees to other national institutions. The committee also called for guaranteed Aboriginal seats in the Senate, if the Aboriginal peoples so wished.

The Supreme Court of Canada

- The existence, composition and jurisdiction of the Supreme Court of Canada are not entrenched in the Constitution.

- The Supreme Court of Canada is established by statute (the *Supreme Court Act*) pursuant to the power of the federal Parliament in s. 101 of the *Constitution Act, 1867* "to provide for the constitution, maintenance, and organization of a general court of appeal for Canada." Therefore, the federal Parliament has the sole power to regulate the Court.

- The *Supreme Court Act* provides that the Court is to be comprised of nine judges, three of whom must be from Quebec. By convention the composition of the Court has followed a particular regional makeup: three judges from each of Quebec and Ontario, two from the Western provinces and one from the Atlantic provinces. Also by convention, the Chief Justiceship has usually alternated between French-speaking and English-speaking incumbents.

- The judges of the Court are appointed by the Governor in Council (the federal Cabinet) on the recommendation of the Prime Minister, in the case of the Chief Justice, and on the recommendation of the federal Minister of Justice in the case of all of the other judges of the Court. In practice, there is confidential consultation with the organized bar as to possible appointees.

- Appointments are not subject to review or ratification by the Senate, the House of Commons or a legislative committee. There is no public scrutiny of appointments.

- The provinces have no role in the selection of judges, and are not, in practice, consulted before an appointment is made.

- The function of the Court is to "have, hold and exercise an appellate, civil and criminal jurisdiction within and throughout Canada." It determines cases which concern both federal and provincial laws, and provides advisory opinions on questions of law or fact referred to it by the federal government (the provinces can seek advisory opinions from their provincial courts of appeal, whose decisions could then be appealed to the Supreme Court of Canada).

- Two of the primary responsibilities of the Court are as follows: to determine whether legislation comes within the authority of the government which has enacted it, a question concerning the division of legislative powers; and to determine whether legislation complies with the *Charter of Rights and Freedoms*. If the legislation either does not come within the authority of the body enacting it, or if it violates the *Charter of Rights and Freedoms*, then the Court will declare it invalid and the legislation will therefore be of no force or effect.

- Under the recent federal proposals, there would be a constitutional amendment to provide a provincial and territorial role in Supreme Court appointments. The federal government would appoint "acceptable" individuals from lists of nominees submitted by provincial and territorial governments. In addition, the federal government would be prepared to proceed with the constitutional entrenchment of the Supreme Court and its composition if it were found desirable to proceed with any unanimity items in the final package. (This kind of amendment would require the unanimous consent of Parliament and the ten provincial legislatures.)

- The Ontario Select Committee also supported the federal proposal to entrench the requirement that three Supreme Court judges come from Quebec, and proposed a model to give the provinces and territories a larger role in Supreme Court appointments.

- The Beaudoin-Dobbie committee approved the federal proposal to entrench the Supreme Court and its current composition. It also offered a way to avoid paralysis in the event of intergovernmental deadlock over appointments.

The Electoral System and the Political Process

- Some of the provisions of the Constitution which concern the electoral system and the political process are ss. 17, 37-41, 44-57, 69-80, and 82-88 of the *Constitution Act, 1867*, and ss. 3-5 of the *Charter of Rights and Freedoms*.

- The House of Commons and the Legislatures of the provinces are elected on the basis of universal adult suffrage. Elections must be held at least every five years.

- Members of the House of Commons are elected in territorially based constituencies. The winning candidate is the one who receives the most votes. This is known as the "first past the post" or plurality electoral system.

- Critics of the "first past the post" system point out that it usually results in a government elected with only a minority of support from the electorate. This is because candidates need only a plurality of votes to win, not a majority. In the last 50 years, only two governments have been elected with the support of 50% or more of the votes (the Diefenbaker and Mulroney governments in 1958 and 1984, respectively).

- The "first past the post" system also has a tendency to under-represent minority parties, since the votes they attract in constituencies they do not win are not translated into seats.

- One alternative electoral system would be a system based on proportional representation. The objective of such a system is to ensure that the distribution of seats in the legislature reflects as closely as possible the support candidates and parties receive in the election. The most common form is "list" proportional representation. Voters vote for a party rather than an individual, and members of the legislature are selected from national or regional party lists of candidates in numbers proportional to their party's vote. If a party receives 60% of the vote it is entitled to 60% of the seats: if this is the equivalent of 20 seats in the legislature, the top 20 names on the party list are elected.

- There are 295 seats in the House of Commons at present (*Constitution Act, 1867*, s. 37). The number of seats is to be readjusted on the completion of each decennial census according to the electoral formula set out in s. 51 of the Act, and subject to the requirements that every province is entitled to at least as many MPs as Senators (s. 51A) and that the proportionate representation of the provinces is not disturbed (s. 52). The requirement of proportionate representation ensures that the smaller provinces are guaranteed a certain number of seats vis-a-vis the larger provinces, regardless of population shifts.

- The present electoral formula was enacted by the *Constitution Act, 1985 (Representation)*. As applied for the purposes of the 1988 election, the election formula operated as follows: Canada's population was divided by 279 (the existing number of seats allocated to the provinces), giving an electoral quotient. The population of each province was then divided by this quotient, giving the number of seats in each province. These results were then adjusted by applying "grandfather" and "senatorial" clauses, which guarantee that no province would have fewer seats than it had on the date the Act came into force (March 6, 1986) and no province would have fewer Mps than it had

senators, respectively. In addition to the seats allocated to the provinces through this formula, two seats were allocated for the Northwest Territories and one for the Yukon. As indicated, this system produced a House of 295 Members for the 1988 election.

- The most important convention governing the operation of political parties in the House of Commons is party discipline. This ensures that Mps vote on legislation as their leaders direct. Stable government depends on party discipline, for a government cannot remain in office unless it can survive non-confidence motions moved by the opposition. On the other hand, it is often argued that party discipline stifles the creativity of backbenchers, and prevents them from representing their constituents adequately.

- Under the recent federal proposals, the Government of Canada commits itself to a process of parliamentary reform to give individual Mps more free votes and to reduce the application of votes of confidence.

- The electoral districts in Ontario are determined by statute (*Representation Act, 1986*) of the provincial Legislature. At present the Legislative Assembly of Ontario consists of 130 members, one for each district.

- The Ontario Select Committee recommended that Ontario's Standing Committee on the Legislative Assembly study possible reforms to the electoral and political system in the province.

- The Beaudoin-Dobbie committee observed that the federal proposals regarding reform to the House of Commons did not require constitutional change. It recommended they be dealt with by the Commons and not as part of the current constitutional talks.

PROCESS OF CONSTITUTIONAL REFORM

Starting Points

These notes addressed question such as the following:

- In what ways should the public be involved in the process of amending the Constitution? In particular, what role should public hearings or a constituent assembly play in developing or commenting on constitutional proposals?

- Are there particular groups or interests that should be represented in negotiations - for example, Aboriginal peoples or women? How should this be ensured?

- What role should First Ministers' Conferences play in the reform process?

- Whose approval should be required for constitutional amendments? Are there particular amendments to the Constitution which should require unanimous approval of all the provinces?

- Should a province have the right to opt out of a constitutional amendment? When? When should compensation be provided?

- What role should the public play in the approval of constitutional amendments? For example, what role should referenda or constituent assemblies play?

Background

- The procedures for amending the Constitution are set out in Part V of the *Constitution Act, 1982* (ss. 38-49).

- Amendments may be initiated by either the Senate, House of Commons or the Legislative Assembly of one of the provinces. Private citizens cannot initiate constitutional amendments.

- The Constitution does not provide for any particular process for negotiating constitutional amendments. It also does not require public hearings with respect to constitutional amendments which are proposed.

- A referendum is the principle or practice of submitting to popular vote a measure passed or proposed by a legislative body or by popular initiative. A referendum could be used to simply solicit the public's views on proposals under consideration, or it could be used as a requirement for enacting a constitutional amendment. There is no legal requirement or provision in the Constitution for referenda with respect to constitutional amendments.

- The general idea of a constituent assembly is one in which a group of individuals, selected to represent the interests of the population at large, are convened to either consider or develop constitutional proposals. The group of individuals could be representative in the sense of being selected or elected by the public to participate in the assembly, or they could consist of elected representatives. Given the federal nature of Canada, "delegates" could be selected or elected on a provincial or regional basis. There is no legal requirement or provision in the Constitution for convening a constituent assembly with respect to constitutional amendments.

- The amending procedures generally set out how the Constitution may be amended, with a particular focus on who must approve a particular amendment. The procedure varies depending on the provision of the Constitution concerned. In total, there are five different amending formulas which operate and apply as follows:

- *The General Amending Formula: Parliament and Seven Provinces.* This formula (known as the 7/50 formula) requires the consent of Parliament and two-thirds of the provinces (ie. at least 7), representing at least 50% of the population of all the provinces. It is the general amending formula in the sense that it applies to all amendments not provided for specifically in the other amending formulas. The general formula covers, for example, most aspects of the division of powers and the Charter of Rights. In addition, the general formula applies to amendments concerning the following matters:

    - the principle of proportionate representation of the provinces in the House of Commons;

    - the powers of the Senate, method of selecting Senators, the number of Senators each province is afforded, and residence qualifications for Senators;

    - the Supreme Court of Canada, other than its composition (which requires unanimous consent);

    - the extension of existing provinces into territories; and

    - the establishment of new provinces.

- *Parliament and All Provinces.* The amendments covered by the second formula require the consent of Parliament and all of the provinces. The provisions covered by this formula concern the following matters:

    - the office of the Queen or her representatives in Canada;

    - the right of a province to a number of members in the House of Commons not less than the number of Senators to which the province was entitled at the time this provision came into force (April 17, 1982);

    - the use of English or French;

    - the composition of the Supreme Court of Canada; and

    - any amendment to the amending procedures.

- *Parliament and Affected Province(s).* Amendments which concern a provision that applies to one or more, but not all provinces, require the consent of Parliament and the provincial legislature(s) affected by the amendment. In particular, this formula applies to any amendments which involve alterations to the boundaries between provinces, and any amendment which relates to the use of English or French within a province.

Note: Under the three amending formulas described above, the Senate has a suspensive veto, whereby it can delay passage of an amendment by 180 days and require the House of Commons to repass it. However, it cannot kill the resolution, as it can with bills.

- *Parliament Alone* Subject to certain exceptions, amendments which concern provisions of the Constitution that relate to the executive government of Canada or to the Senate and House of Commons may be made unilaterally by Parliament by ordinary legislation;

- *Provinces Alone* Subject to certain exceptions, amendments which concern the constitution of a province may be made by the legislature of that province.

- A province may opt out of any amendment that diminishes its legislative powers, proprietary rights or any other rights or privileges of the legislature or government of that province, and to which the "general amending formula" applies (except for those specific matters set out under the general formula above). To do this a province must formally dissent from the amendment. If a province opts out of an amendment which transfers provincial powers to Parliament relating to education or other cultural matters, reasonable compensation must be provided by Canada.

- Once the requisite bodies (as set out above) have passed resolutions authorizing an amendment, the formal act of amendment is accomplished by proclamation issued by the Governor General (except in the cases of Parliament or the provinces acting alone where this is not required). With respect to matters covered by the general amending formula, the proclamation (and therefore the passage of the resolutions) must be made within three years from the adoption of the resolution initiating the amendment procedure (s. 39(2)). It cannot be made within the first year, unless all of the provinces have responded by expressly adopting either a resolution approving or dissenting from the amendment (s. 39(1)).

- The *Meech Lake Accord* (1987) proposed two changes to the amending formulas:

  - the unanimity formula would have applied to a number of additional matters, such as Senate reform and the creation of new provinces, which currently fall under the general amending formula (the 7/50 formula). These additional matters are listed in s. 42 of the *Constitution Act, 1982*; and

  - compensation would have been provided to a province opting out of any amendment transferring provincial legislative powers to Parliament. Thus, compensation would not have been restricted to transfers of provincial powers related to education or other cultural matters.

- Under its September 1991 proposals, the federal government would be prepared to proceed with the changes to the amending formulas as specified in the *Meech Lake Accord* "if a consensus on this matter were to develop." However, provincehood for the territories would continue to fall under the general amending formula. Before the federal government moved ahead with these changes, a further condition would have to be satisfied. It would have to be found "desirable" to proceed ultimately with any items requiring unanimous consent, such as entrenching the composition of the Supreme Court, in the final package.

- The September proposals also expressed a commitment to ensuring that Aboriginal peoples participate in the current constitutional deliberations.

- The Ontario Select Committee recommended the government of Ontario be required to hold public hearings on any constitutional resolution it might introduce to the legislature. It did not take a final position on a constituent assembly or referenda. The committee proposed a model for the amending formula which it says addresses the need to treat provinces equitably but also recognizes the will of the majority of Canadians; this model gives a veto for Ontario and Quebec, and regional vetoes to Western and Atlantic Canada.

- The Beaudoin-Dobbie committee did not take a final position on Quebec's demand for a constitutional veto; instead, it urged the matter be given top priority in the next round of constitutional talks, and put forward several possible solutions, all of which would require Quebec's consent for major amendments.

- The federal committee recommended the federal government be empowered to hold a national consultative referendum, if it desired.

- The committee recommended several measures to ensure the protection of the rights of Aboriginal peoples in constitutional discussions, including ensuring their participation and consent to changes affecting them.